



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RTID 0648-XD671

Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act—Notification of Issuance of Comparability Findings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: Under the authority of the Marine Mammal Protection Act (MMPA), the NMFS Assistant Administrator for Fisheries (Assistant Administrator) has issued comparability findings for the Government of New Zealand's (GNZ) regulated fisheries: West Coast North Island multi-species set-net fishery, and West Coast North Island multi-species trawl fishery. NMFS bases the comparability findings on documentary evidence submitted by the GNZ and other relevant, readily available information.

DATES: These comparability findings are valid from February 21, 2024, through December 31, 2025, unless revoked or revised by the Assistant Administrator in a subsequent action.

FOR FURTHER INFORMATION CONTACT: Kellie Foster-Taylor, NMFS Office of International Affairs, Trade, and Commerce at mmpa.loff@noaa.gov or by phone at 301-427-7721.

SUPPLEMENTARY INFORMATION:

The MMPA Import Provisions

The MMPA, 16 U.S.C. 1371 et seq., states that the Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental

serious injury of ocean mammals in excess of U.S. standards. For purposes of applying this import restriction, the Secretary of Commerce shall insist on reasonable proof from the government of any nation, from which fish or fish products will be exported to the United States, of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States.

In August 2016, NMFS published a final rule (81 FR 54390; August 15, 2016) implementing the fish and fish product import provisions in section 101(a)(2) of the MMPA (MMPA Import Provisions). This rule established conditions for evaluating a harvesting nation's regulatory programs to address incidental and intentional mortality and serious injury of marine mammals in fisheries operated by nations that export fish and fish products to the United States. Under the final rule, fish or fish products may not be imported into the United States from commercial fishing operations that result in the incidental mortality or serious injury of marine mammals in excess of U.S. standards (16 U.S.C. 1371(a)(2)).

The final rule established a 5-year exemption period, through December 31, 2021, before imports would be subject to any trade restrictions (see 50 CFR 216.24 (h)(2)(ii)). The Department of Commerce and NMFS have revised the regulations implementing the Fish and Fish Product Import Provisions of the MMPA Import Provisions to extend the exemption period, most recently on November 17, 2023. Following careful consideration, the Department of Commerce and NMFS concluded that additional time is required to effectively complete the comparability finding evaluation process and issued a **Federal Register** notice (88 FR 80193; November 17, 2023) extending the exemption period to end on December 31, 2025 for foreign nations to receive a comparability finding for their commercial fishing operations to export fish and fish products to the United States.

In the 2016 final rule, NMFS stated that it may consider emergency actions during the exemption period to ban imports of fish and fish products from a foreign fishery having or likely to have an immediate and significant adverse impact on a marine mammal stock. (81 FR 54390; August 15, 2016). In addition, pursuant to the MMPA Import Provisions rule, nothing prevents a nation from implementing a bycatch reduction regulatory program and seeking a comparability finding during the exemption period. The GNZ submitted its comparability finding application by the November 30, 2021 regulatory deadline, including information pertaining to the West Coast North Island multi-species set-net fishery and the West Coast North Island multi-species trawl fishery. In December 2022, after the Court of International Trade (CIT) enjoined the two fisheries, the GNZ submitted supplemental documentary evidence regarding its monitoring and reporting programs and estimates of Māui dolphin (*Cephalorhynchus hectori maui*) mortality and serious injury pertaining to the two enjoined fisheries for NMFS' consideration for comparability findings. NMFS is undertaking this action in response to the GNZ's request and prior comparability findings, its 2021 application for comparability findings and its submission of additional documentary evidence regarding its regulatory program to reduce mortality and serious injury of Māui dolphin in the West Coast North Island multi-species set-net fishery and the West Coast North Island multi-species trawl fishery.

Petition for Rulemaking and Request for a Comparability Finding

On May 21, 2020, Sea Shepherd New Zealand and Sea Shepherd Conservation Society (collectively, "Plaintiffs") initiated a lawsuit in the CIT challenging NMFS' denial of its petition. On June 24, 2020, the GNZ announced its final fisheries measures for reducing bycatch of Māui dolphins (effective October 1, 2020) and its final Threat Management Plan (TMP).

On July 15, 2020, the GNZ requested that NMFS perform a comparability assessment of the TMP and its regulatory program as it relates to Māui dolphins.

On November 9, 2020, NMFS issued comparability findings for the West Coast North Island multi-species set-net and trawl fisheries because the GNZ had implemented a regulatory program governing the bycatch of Māui dolphin that is comparable in effectiveness to U.S. standards. Based on NMFS' decision, Plaintiffs subsequently filed a Motion for Preliminary Injunction on December 11, 2020.

The CIT granted this preliminary injunction, requiring the imposition of import restrictions and a comparability finding determination for the export fisheries operating on the West Coast North Island within the Māui dolphin's range. The judge's order effectively removed the operative exemption period protections for these fisheries.

In November 2021, the GNZ submitted its comparability finding application to NMFS for all its fisheries on the List of Foreign Fisheries (LOFF), including the West Coast North Island multi-species set-net fishery and the West Coast North Island multi-species trawl fishery. In December 2022, after the CIT enjoined the two fisheries, the GNZ submitted supplemental documentary evidence regarding its monitoring and reporting programs and estimates of Māui dolphin mortality and serious injury, along with supplemental regulatory information, pertaining to the two enjoined fisheries for NMFS' consideration for comparability findings.

Under the MMPA Import Provisions, the Assistant Administrator is reconsidering comparability findings that were previously issued on November 9, 2020, based on supplemental information provided by the Plaintiffs and New Zealand since that time. As part of this review of comparability findings under the reconsideration provisions, NMFS has consulted with the GNZ to ascertain and discuss additional measures intended for implementation to eliminate the risk of Māui dolphin bycatch in the future. The following is a summary of NMFS' analysis and provides the evidence supporting

compliance with each of the conditions needed for a comparability finding. Procedures and conditions for a comparability finding are specified in the MMPA Import Provisions at 50 CFR 216.24 (h)(6).

NMFS Determination on the GNZ's Comparability Finding Request

The Government of New Zealand's Regulatory Actions and Mitigation Plan

The GNZ manages human-induced threats to Māui dolphins under a Hector's and Māui dolphin TMP. The TMP is underpinned by a spatial risk assessment informed by the best available scientific information. On October 1, 2020, the GNZ adopted regulations to manage fisheries threats effectively that include:

- A nationwide ban on recreational and commercial drift netting;
- An extension of current set-net closures and the creation of new areas closed to set-netting in the North and South Islands;
- An extension of the existing area closed to trawling off the West Coast of the North Island;
- A management trigger that becomes effective if a single fishing-related mortality of a dolphin occurs within the Māui Dolphin Habitat Zone (MDHZ) (from Cape Reinga to Wellington). This trigger allows the Minister of Fisheries to immediately impose additional fishing restrictions, including prohibiting all or any fishing or fishing methods within the West Coast of the North Island; and
- An authorization to use commercial ring nets in set-net prohibition areas within West Coast North Island harbors (ring nets are a fishing method that does not pose a risk to the dolphins).

Evidence that New Zealand Bans Intentional Mortality and Serious Injury of Māui Dolphins

Based on information provided by the GNZ, its Marine Mammal Protection Act of 1978 and the Fisheries Act of 1996 the primary legislation governing the GNZ's

fisheries management system, prohibit the intentional killing of marine mammals in the course of commercial fishing operations and are comparable to U.S. standards.

Evidence of a Vessel Registration System for Export Fisheries

The GNZ's Fisheries Act of 1996 requires that vessels must be registered as a New Zealand ship (flagged to New Zealand) and be on the Fishing Vessel Register to commercially fish in New Zealand's waters. Based on NMFS Office of International Affairs, Trade, and Commerce's (IATC) analysis of the GNZ's Fisheries Act of 1996, the GNZ's regulations and vessel registration system are comparable to U.S. standards.

Evidence of a Monitoring Plan

The GNZ's Marine Mammal Protection Act of 1978 and the Fisheries Act of 1996 require fishermen to report the mortality and injury of marine mammals in the course of commercial fishing. The GNZ has two types of monitoring programs: an at-sea monitoring program (observers and electronic monitoring) and vessel logbooks (self-reporting).

The MDHZ was created along the West Coast of the North Island (including harbors) from the coast out to 12 nautical miles. The MDHZ covers approximately 90-95 percent of Māui dolphin habitat. Fishing effort within the MDHZ has been declining while monitoring effort has been increasing since the MDHZ fishing prohibitions went into effect. The levels of effort reduction and monitoring have been different for the set net and trawl fleets. Since the 2020-2021 fishing year, fishing effort has been reduced by 71 percent for the trawl fleet and 97 percent for the set net fleet while 50 percent of trawl effort and 90 percent of set net effort were monitored. In 2022, the GNZ issued an amendment to its Fisheries (Electronic Monitoring) regulation that expanded the electronic monitoring program to include the entire MDHZ. This regulation states that if a vessel is qualified to carry a camera, then a vessel is unable to fish without an on-board camera. Based on IATC's analysis of GNZ's regulations and the implementation of the

MDHZ and its accompanying rules, the GNZ's self-reporting and observer programs are comparable in effectiveness to U.S. standards. IATC also finds the GNZ's on-board camera monitoring program exceeds U.S. standards. New Zealand's 90 percent monitoring coverage through its monitoring program exceeds the U.S. requirements of section 118 of the MMPA for statistically reliable bycatch estimates. New Zealand's electronic monitoring and observer program allows New Zealand to act in near real-time in the unlikely event that a Māui dolphin were bycaught in a fishery allowing Minister to start an immediate review of New Zealand's program to determine additional actions to be taken to reduce Māui dolphin bycatch below the bycatch limit. Both nations also take observer health and safety along with vessel operational safety into consideration when determining deployments of observers on vessels 8 meters or less.

Evidence of a Population Abundance Estimate for Māui Dolphins

The GNZ has an abundance estimate for Māui dolphins, which follows a scientifically sound process to estimate abundance and has plans to undertake a stock assessment survey to update that abundance estimate. Based on NMFS' analysis the GNZ meets the condition to have an abundance estimate for a marine mammal stock, and their system for Māui dolphin abundance estimation is comparable in effectiveness to U.S. standards.

Evidence of a Bycatch Limit

The GNZ has established a bycatch limit of one Māui/Hector's dolphin. When a bycatch limit has been set, the GNZ's Fisheries Act enables the Minister to prohibit all or any fishing or fishing methods in an area to ensure that any limit on fishing-related mortality is not exceeded. The purpose of the Fisheries Act is to provide for the utilization of fisheries resources while ensuring sustainability. This means that the Minister does not have discretion to choose whether to act or not, but rather the Minister

has authority to quickly enact additional prohibitions considered necessary to ensure the bycatch limit is not exceeded.

The GNZ created a Māui dolphin Threat Management Plan (TMP). The TMP provides clear objectives to ensure that government agencies are operating collectively. Some of the TMP objectives are: ensure that dolphin deaths arising from fisheries threats do not exceed the population sustainability threshold (PST) with 95 percent certainty, causes localized depletion, create substantial barriers to dispersal between subpopulations, and allow localized subpopulations to recover and/or remain at or above 80 percent of their unimpacted status with 95 percent certainty. The TMP is underpinned by the GNZs multi-species Spatially Explicit Fisheries Risk Assessment (SEFRA) model. The SEFRA model allows for improved statistical estimation of commercial fisheries risks to protected species. Specifically, the SEFRA model addresses the needs of fisheries managers in low information fisheries where observer coverage is low and protected species capture rates are rare to inform statistically robust capture estimates.

Evidence of a Regulatory Plan to Reduce Bycatch below the Bycatch Limit

Based on IATC's analysis, the GNZ's regulatory program, including the fishery-specific area restrictions are comparable in effectiveness to U.S. standards. This regulatory program will result in Māui dolphin bycatch below PBR and concentrate the fisheries restrictions in the areas with the greatest risk, specifically those areas where fishing activities overlap with the Māui dolphin population. These restrictions, which are focused on the area that represents the greatest density of Māui dolphins, virtually eliminates the bycatch risk from set-nets and significantly reduces the trawl bycatch risk for Māui dolphins in this area. The additional restrictions at the northern and southern extent (tails of the population) of the Māui dolphin distribution reduces the bycatch risk for the extreme ranges (smaller proportion). This is comparable to U.S. standards, which does not require that a Take Reduction Plan or the U.S. regulatory program eliminate 100

percent of the bycatch risk to a particular marine mammal stock. The U.S. regulatory program seeks to target the greatest percentage of risk in the areas with the greatest overlap of fishing and the marine mammal distribution and mitigate that bycatch risk below the bycatch limit for that specific marine mammal.

As a result of these findings, NMFS announces the issuance of positive comparability findings that will allow the importation into the United States of fish and fish products harvested by New Zealand's set-net and trawl fisheries operating off the West Coast North Island within the Māui dolphin's range.

Authority: 16 U.S.C. 1361 *et seq.*

Dated: January 19, 2024.

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